

STATE OF MICHIGAN
COURT OF APPEALS

KAREN SCHMIDT and RICHARD SCHMIDT,

Plaintiffs-Appellants,

UNPUBLISHED
January 24, 2003

v

THOMAS VITU and MOFFETT & DILLON,
P.C.,

No. 238038
Oakland Circuit Court
LC No. 01-028453-NM

Defendants-Appellees.

Before: Cooper, P.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Karen Schmidt entered Port Huron Hospital for a colonoscopy. During preparation for the procedure a nurse attempted to start an IV line in Schmidt's right arm. Schmidt felt a painful electrical shocking sensation in her arm. The nurse started the IV line in Schmidt's left arm, and the procedure was completed. Several days later Schmidt's right hand began to contract into a fist. Eventually her hand contracted into a permanent clenched fist.

Plaintiffs retained defendant Thomas Vitu and his firm, defendant Moffett & Dillon, P.C., and filed a medical malpractice action against the hospital and the nurse.¹ A jury trial commenced in St. Clair Circuit Court. Plaintiffs' expert, Dr. Paul Cullis, a board-certified neurologist, testified that in his opinion the improper insertion of the IV needle into Karen Schmidt's right arm caused damage to a nerve and resulted in dystonia, which is a sustained involuntary muscle contraction causing abnormal postures. Cullis testified that his conclusion that Karen Schmidt's condition was caused by dystonia was accepted in the medical literature.

On cross-examination Cullis stated his assertion that his conclusion that Karen Schmidt's condition was caused by dystonia was based on only two medical journal articles. In addition,

¹ *Schmidt v Port Huron Hospital, et al*, St. Clair Circuit Court Docket No. 98-000011-NH.

Cullis stated that his conclusion was based on a determination that Karen Schmidt's brain was not working properly. He stated that the cause of such a malfunction would be totally unknown in neurology. Furthermore, Cullis observed that generally a nerve injury resulted in muscle weakness because the muscles could not be activated, and conceded that a nerve injury resulting in dystonia, the opposite of muscle weakness, was a paradox. He acknowledged that he had never seen a case like that presented by Karen Schmidt. Cullis also noted that Karen Schmidt suffered from a genetic condition that results in involuntary muscle contractions, and compared her circumstances to having been struck by lightning twice.

In the underlying case plaintiffs called Barbara Walton, a registered nurse, to testify regarding the nursing standard of care for IV needle insertion. Defendants objected, and the trial court ruled that Walton did not qualify as an expert witness under MCL 600.2169(1)(b) because for one year prior to the incident (i.e., the needle insertion on November 21, 1996) she was not practicing as a nurse for at least one-half of her professional time, nor was she teaching in either an accredited health professional school or an accredited residency or clinical research program.

Following Walton's disqualification, Vito advised plaintiffs that they should settle the case. Plaintiffs settled the medical malpractice case for \$40,000, notwithstanding the fact that they had rejected the case evaluation of \$200,000.

Plaintiffs filed the instant legal malpractice suit in which they alleged that defendants negligently failed to retain a properly qualified witness to testify regarding the applicable nursing standard of care, negligently failed to present a case of medical malpractice in the underlying action, and negligently failed to fully explain the ramifications of settling the underlying action. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). They argued that because plaintiffs could not prove causation as a matter of law in the underlying medical malpractice action, they suffered no legal malpractice. Defendants contended that because Cullis's testimony could not establish proximate cause as a matter of law, plaintiffs could not show that but for the attorney's alleged malpractice, they would have been successful in the underlying action. In addition, defendants argued that Walton was qualified to testify as an expert, and that legal malpractice could not be based on the trial court's erroneous ruling to the contrary.

The trial court granted defendants' motion for summary disposition. The court concluded that in light of Cullis's testimony that he had never seen a case like that presented by Karen Schmidt and that Karen Schmidt suffered from a genetic condition that resulted in involuntary muscle contraction, it could not be said that it was more probable than not that Karen Schmidt's injury resulted from the improper needle insertion. The court found as a matter of law that plaintiffs could not establish proximate cause in the medical malpractice case; therefore, they could not establish all the elements of legal malpractice. Finally, the court concluded without explanation that defendants' actions in retaining Walton were not negligent.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

In order to establish a claim of legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). If the alleged malpractice results from the failure to diligently pursue a client's claim, a plaintiff seeking to establish proximate cause and damages must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit. *Id.* at 586.

Proof of causation requires both cause in fact and proximate cause. *Helmus v Dep't of Transportation*, 238 Mich App 250, 255; 604 NW2d 793 (1999). Cause in fact requires a showing that the harmful result would not have occurred but for the negligent conduct. *Id.* A plaintiff must adequately establish cause in fact in order for proximate cause to become a relevant issue. *Id.* at 255-256. To show proximate cause, a plaintiff must prove that the injury was a probable, reasonably anticipated, and natural consequence of the alleged negligence. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 401; 571 NW2d 530 (1997). Generally, proximate cause is an issue for the trier of fact. *Dep't of Transportation v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). However, if reasonable minds could not differ, then the issue becomes one of law for the court. *Id.* Summary disposition is proper if all reasonable persons would agree that the injury to the plaintiff was too insignificantly connected to or too remotely affected by the defendant's negligence. *Berry v J & D Auto Dismantlers, Inc*, 195 Mich App 476, 479; 491 NW2d 585 (1992).

Plaintiffs argue the trial court erred by granting defendants' motion for summary disposition. We disagree and affirm. Plaintiffs' theory was that, but for Vitu's negligence in retaining Walton, they would have prevailed in the underlying medical malpractice suit because Cullis's testimony established that the improper needle insertion proximately caused Karen Schmidt's injuries. *Winiemko, supra*. The trial court properly granted summary disposition on the basis that the evidence did not create an issue of fact as to whether plaintiffs would have prevailed in the underlying medical malpractice suit. Cullis's testimony was not sufficient to establish that, but for defendants' legal malpractice, plaintiffs would have prevailed in the medical malpractice suit. Given that Cullis acknowledged he had never seen a case of dystonia present with the same history, that his opinion rested on an assumption (i.e., that Karen Schmidt's brain malfunctioned) that he could not explain, and that Karen Schmidt had a genetic condition that could result in the same involuntary muscle contraction, it could not be said that it was more probable than not that the improper needle insertion caused nerve damage that resulted in dystonia. To conclude otherwise would require impermissible speculation and conjecture. *Id.* at 586-587. The trial court properly decided the issue of proximate cause as one of law, *Christensen, supra*, and concluded that defendants were entitled to summary disposition because plaintiffs could not establish all the elements of a legal malpractice claim. *Winiemko, supra*.

Even assuming arguendo that the trial court erred in concluding that defendants were not negligent in retaining Walton, that negligence did not result in plaintiffs' damages. A witness qualified to testify regarding the nursing standard of care for needle insertion would not have been qualified to testify as to whether any nerve damage caused by an improper needle insertion resulted in Karen Schmidt's dystonia. Plaintiffs introduced evidence regarding the proximate cause of Karen Schmidt's injuries via the testimony of Cullis, which, for the reasons stated

above, the trial court correctly found to be insufficient as a matter of law. Given that plaintiffs could not establish all of the elements of a legal malpractice claim, the issue of whether defendants were negligent in retaining Walton ultimately is irrelevant.

We affirm.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Michael J. Talbot